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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 209.

UNITED STATES, *Petitioner*,

v.

JOHN STUART KELLY, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Claims.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

OPINION BELOW.

The opinion of the United States Court of Claims is reported at 96 F. Supp. 611 (Ct. Cl., 1951).

JURISDICTION.

The judgment of the United States Court of Claims was entered on May 1, 1951 (R. 37-38). The petition for a writ of certiorari was filed on July 26, 1951, and was granted October 8, 1951 (R. 39). The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

QUESTION PRESENTED.

Whether the Joint Resolution of June 29, 1938, deprives wage rate employees of the Government Printing Office of their right to gratuity pay when required to work on a statutory holiday occurring on a regular work day.

STATUTES AND CONTRACT PROVISION INVOLVED.

1. Joint Resolution of January 6, 1885, No. 5, 23 Stat. 516, as amended by the Joint Resolution of February 23, 1887, No. 6, 24 Stat. 644. This Joint Resolution provides:

> The employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The 1st day of January, the 22d day of February, the day of each year which is celebrated as "Memorial" or "Decoration Day", the 4th day of July, the 25th day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days.

2. Act of January 12, 1895, c. 23, § 46, 28 Stat. 607, 44 U. S. C. § 44. This Act provides:

> The employees of the Government Printing Office shall be allowed the following legal holidays with pay, to wit: The 1st day of January, the 22d day of February, the 4th day of July, the 25th day of December, Inauguration Day, Memorial Day, Labor's Holiday, and such day as may be designated by the President of the United States as a day of public fast or thanksgiving.

3. The Joint Resolution of June 29, 1938, c. 818, 52 Stat. 1246, 5 U. S. C. § 86a. The Joint Resolution provides:

> Whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occur-

rence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day or any other day declared a holiday by Federal statute or Executive Order, or any other day on which the departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

Sec. 2. The joint resolution of January 6, 1885, U. S. C., title 5, sec. 86, and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict.

4. The pertinent section of the holiday rate provision of the wage agreement of October 27, 1924, which was in effect at all times material hereto follows:

Holiday Rate. Employees required to work on a legal holiday or a special holiday declared by Executive Order shall be paid at the day rate plus 50 percent for all the time actually employed in addition to their gratuity pay for the holiday as provided by law; * * * (R. 7).

STATEMENT.

This case was presented to the United States Court of Claims upon a stipulation of facts agreed to by counsel for Respondents and Petitioner. Although the stipulation in this case pertained only to the claim of Respondent John Stuart Kelly, hereafter referred to as Kelly, the questions of law and fact are common to all Respondents in this action. (R. 5-6).

The Public Printer regularly employed Kelly as a journeyman printer in Washington, D. C., from September 1, 1943, to October 15, 1945 (R. 6). Kelly's compensation was fixed by a wage agreement negotiated by the Public Printer and a committee of employees representing the journeyman printers of the Government Printing Office (R. 6) pursuant

to the Act of June 7, 1924.[1] Kelly was required to, and did work on ten statutory holidays during the period September 1, 1943, to October 15, 1945.[2] For work performed on each of such holidays, Kelly was paid only for actual hours of work. He was not paid holiday gratuity pay.[3] Nor was he paid premium pay for hours of work on the holidays in accordance with the wage agreement of October 27, 1924, *supra* p. 3 (R. 7-8).

On April 23, 1948, Kelly submitted a claim to the Acting Public Printer requesting gratuity pay for the statutory holidays referred to above. Thereafter, this claim was forwarded to the Comptroller General's office. In addition, Kelly also requested premium pay for actual hours he was required to work on the above statutory holidays in accordance with the holiday rate provisions of the wage agreement (R. 8). The Comptroller General, in a decision characterized by the court below as "obviously surprising" (R. 30), denied Kelly's claim and ruled that he was only entitled to receive "exactly the same pay as those who were not required to work" (R. 30). The Comptroller General denied Kelly's claims upon the following grounds: First,

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[1] 43 Stat. 658, c. 354, § 1, 44 U. S. C. § 40.

[2] Petitioner attaches great importance to the fact that these holidays occurred during the war period when per annum employees were required to work on days normally observed as holidays pursuant to executive action (Pet. Br. 1-2). It also relies heavily on the fact that memoranda over the signature of the Administrative Assistant to the President were circulated to heads of executive departments advising them that days normally observed as holidays would be regular work days with the exception of Christmas (Pet. Br. 4, 5). It will be demonstrated hereafter in this brief that these factors are wholly irrelevant to the issue involved in this case.

[3] The court below pointed out that the term "gratuity" is inaccurate because Kelly was "as much entitled to it as he is to the rest of his pay" (R. 28). However, the term "gratuity" will be used in this brief to designate holiday pay in order to be consistent with Petitioner's use of the term.

that the provision of the wage agreement requiring payment of "gratuity pay for the holiday as provided by law" (R. 7) did not entitle Kelly to gratuity pay because the Joint Resolution of June 29, 1938, repealed the holiday gratuity pay statutes.[4] Second, that the provision of the wage agreement requiring payment of the day rate plus 50 percent for hours actually worked on a holiday was ineffective on the ground that the Act of March 28, 1934, 48 Stat. 522, 5 U. S. C. § 673c, did not permit payment at a rate in excess of the regular daily rate for work on holidays falling within the regular tour of duty (R. 4-5).

Kelly's suit in the court below was based upon two separate and distinct claims. One claim was for the payment of premium pay for hours of work performed on holidays in accordance with the wage agreement of October 27, 1924, *supra* p. 3. The second claim was for holiday gratuity pay pursuant to the Joint Resolution of June 29, 1938, and the Act of January 12, 1895, *supra* pp. 2-3, and other holiday statutes which allow holidays to wage rate employees such as Respondents.[5] With respect to the claim for holiday gratuity pay Petitioner contended that since Kelly was required to work on such statutory holidays, he should be deprived of his gratuity pay as well as his day of rest which were provided by statute. The court below rendered judgment in favor of Kelly on both claims (R. 35). The court unanimously agreed that Kelly was entitled to premium pay for hours worked on holidays in

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[4] In its brief, Petitioner erroneously refers to the Comptroller General's decision as holding that the Joint Resolution of June 29, 1938, "had abolished gratuity pay for *work performed* on holidays • • • " (Pet. Br. 7) [italics supplied]. It is apparent that Petitioner fails to distinguish premium pay for work performed on holidays from holiday gratuity pay which is *not* compensation for hours of work. There are numerous other instances where Petitioner fails to recognize this vital distinction in its arguments (Pet. Br. 8, 18, 35, 38-39).

[5] e. g., Act of May 13, 1938, c. 210, 52 Stat. 351, 5 U. S. C. 87a.

accordance with the wage agreement of October 27, 1924.[6] The court, two judges dissenting, also awarded Kelly gratuity pay when he was required to work on statutory holidays. However, even the dissenting judges conceded that their conclusion "seems inequitable" because "It would seem that the employee who is called back to work on a holiday should receive gratuity pay, plus regular pay, * * *, but * * * only Congress has the power to correct what does seem to be an inequity" (R. 36-37).

SUMMARY OF ARGUMENT.

The Joint Resolution of June 29, 1938, hereafter referred to as the 1938 Resolution, was enacted to correct an injustice to wage rate employees which grew out of an Executive Order excusing federal employees from duty on December 24, 1937. Consequently, wage rate employees who were excused from work on that day lost their wages for the day. To remedy this situation, a Resolution was introduced in the House of Representatives to provide compensation for such employees who were excused from duty on that day. This Resolution was amended and thereafter enacted to provide permanent "statutory authority for such payments as a general practice and thus obviate the necessity for special resolutions by Congress."

Petitioner contends that when wage rate employees are required to work on a holiday they should be deprived of gratuity pay allowed by statute because they have also been deprived of their day of rest. Petitioner's argument is based upon the premise that the 1938 Resolution repealed prior holiday statutes which allow such gratuity pay and that Respondents' rights must be determined solely by reference to the 1938 Resolution. Thereupon, Petitioner con-

[6] Although Petitioner contended below that § 23 of the Act of March 28, 1934, c. 102, Title II, § 23, 48 Stat. 522, 5 U. S. C. § 673c prohibited the payment of premium pay for work on holidays falling within the regular forty-hour work week, it now concedes that Kelly is entitled to such premium pay (Pet. Br. 8).

cludes that Respondents are not entitled to gratuity pay because the express terms of the 1938 Resolution provide gratuity pay for wage rate employees only when they are "relieved or prevented from working." Respondents' position is that the 1938 Resolution is not inconsistent with provisions of holiday statutes *in pari materia* which grant wage rate employees gratuity pay when required to work on statutory holidays.

I.

Under the Joint Resolution of January 6, 1885, and the Act of January 12, 1895, hereafter referred to as the 1895 Act, wage rate employees such as Kelly, are allowed designated holidays with pay. Whenever such employees are required to work on statutory holidays, they are entitled to their regular pay for hours of work in addition to the gratuity pay allowed by the statutes. Petitioner's argument that the 1895 Act was flatly repealed by the 1938 Resolution violates the fundamental rule against repeals by implication. It is clear that in the absence of an express repeal, the 1938 Resolution must be reconciled with the 1895 Act which is *in pari materia* and effect given to all provisions thereof to the extent that they are not inconsistent. The 1938 Resolution is silent with respect to payment of gratuity pay when employees are required to work on holidays occurring on regular work days. Thus, it is apparent that Respondents are entitled to gratuity pay when required to work on a statutory holiday occurring on a regular work day under the provisions of the 1895 Act which continue in effect because they are not inconsistent with the 1938 Resolution.

II.

Even if it is assumed that Kelly's right to gratuity pay must be determined solely by reference to the literal terms of the 1938 Resolution, as Petitioner contends, Kelly is nevertheless entitled to such pay when required to work on a statutory holiday occurring on a regular work day. The

statutory holidays which are referred to in the 1938 Resolution are in fact "allowed" by the 1895 Act and other holiday statutes *in pari materia*. See *John Di Benedetto* v. *United States*, 108 C. Cls. 18, 24 (1947) cert. denied 332 U. S. 763 (1947). The term "relieved or prevented" in the 1938 Resolution is consistent with the term "allowed" in the 1895 Act. It was established over fifty years ago that the 1895 Act which "allows" holidays is "self-executing" and both relieves and prevents employees from working. Although wage rate employees may be required to work on such days because of the necessities of the situation, they were nevertheless traditionally entitled to their gratuity pay allowed them by statute, in addition to pay for actual hours of work. It is apparent that the term "relieved or prevented" in the 1938 Resolution, merely describes the consequences of being "allowed" a holiday. Since the terms of the 1938 Resolution are consistent with the 1895 Act with respect to holidays occurring on regular work days, Respondents are similarly entitled under the 1938 Resolution to gratuity pay when required to work on such days in addition to pay for hours of work.

The terms "relieved or prevented" in the 1938 Resolution have no independent significance. They must be read in conjunction with the balance of the phrase "solely because of the occurrence of a holiday." This complete phrase in turn must be viewed against the background of the affirmative policy of Congress to improve generally the holiday pay status of "the lowest-paid group [wage rate] of employees in the Government service." When so viewed, it is apparent the phrase accomplishes a single narrow limitation upon holiday benefits provided by holiday statutes *in pari materia*. The legislative history establishes that the sole limitation which Congress sought to achieve was the elimination of gratuity pay for holidays occurring on non-work days, and as the court below pointed out, the words selected were "apt for that purpose." There is no evidence that Congress intended any further limitation of holiday benefits.

Petitioner's contention that the 1938 Resolution remitted the problem of additional compensation for holiday work to collective bargaining agreements and the discretion of employing agencies is unsupported by either legislative history or logic. Indeed, in 1938 Respondents' existing wage agreement providing premium pay for work on holidays was rendered a nullity because in 1934 the Comptroller General had ruled that such premium pay provision was contrary to law. Under such circumstances it is illogical to assume that Congress remitted the payment of additional compensation for holiday work to collective bargaining agreements and the discretion of employing agencies. In any event Petitioner's argument is without merit because the issue in this case does not involve premium pay for hours of work on a holiday. The issue herein is whether wage rate employees who are deprived of their day of rest when required to work on a statutory holiday occurring on a regular work day should also be deprived of their gratuity pay allowed by statute.

Petitioner also argues that Congress enacted the 1938 Resolution in order to equalize the holiday pay status of wage rate employees and per annum employees. The court below found that "there is no basis whatever for thinking that Congress intended to treat" this subject. Not only is there a complete absence of evidence in the legislative history to support Petitioner's contention, but the expressed legislative purpose of the 1938 Resolution was to "prevent an unintentional discrimination" against wage rate employees. Further, Petitioner's contention is illogical because in 1938, per annum employees enjoyed superior overall benefits with respect to pay for holidays and nonwork days as compared with wage rate employees.

III.

Petitioner's argument that the wartime policy of requiring employees to work on days normally observed as holidays deprived wage rate employees of the right to gratuity

pay is both without merit and irrelevant to the issue in this case. The wartime policy upon which Petitioner relies was promulgated by memoranda sent to heads of the executive departments by the Administrative Assistant to the President. Clearly, this policy, effectuated in 1943, has no significance in determining what Congress intended when it enacted the 1938 Resolution five years earlier, during a period of peace. In any event, the memoranda of the President's Administrative Assistant did not effect the right of wage rate employees to gratuity pay provided by statute. The memoranda merely informed the heads of executive departments that no holidays, with the exception of Christmas, would be declared by executive action during the war period. As a result there were no holidays, with the exception of Christmas, for per annum employees because their holidays are declared by executive action. However, the memoranda could not affect the rights of wage rate employees because their holidays as well as the gratuity pay are allowed by statute.

ARGUMENT.

I.

Wage Rate Employees Of The Government Printing Office Who Are Required To Work On Statutory Holidays Occurring On Regular Work Days Are Entitled To Holiday Gratuity Pay Under The 1895 Act.

The 1938 Resolution provides gratuity pay, "whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, * * *." These statutory holidays which are referred to in the 1938 Resolution are "allowed" with pay to employees of the Government Printing Office by the 1895 Act, and other holiday statutes *in pari materia*.

Petitioner contends that the 1938 Resolution deprives Kelly of his gratuity pay which wage rate[7] employees traditionally received under holiday statutes *in pari materia* when required to work on statutory holidays because he was not "relieved or prevented from working" on such holidays. Respondent's position is that the 1938 Resolution does not deprive Kelly of such gratuity pay because it is not inconsistent with provisions of holiday statutes *in pari materia* which traditionally entitled wage rate employees to gratuity pay when required to work on statutory holidays. The 1938 Resolution merely modifies holiday statutes *in pari materia* by eliminating the right to gratuity pay when the holiday occurs on a nonwork day.

A. Holiday Statutes in Pari Materia With the 1938 Resolution Grant Gratuity Pay to Wage Rate Employees When They Are Required to Work on a Statutory Holiday.

The Joint Resolution of April 16, 1880,[8] hereafter referred to as the 1880 Resolution, provided that "Employees of the Government Printing Office shall be allowed" designated holidays "with pay". The 1880 Resolution was superseded by the Joint Resolution of January 6, 1885,[9] hereafter referred to as the 1885 Resolution, *supra* p. 2. The 1885 Resolution merely increased the number of groups of wage rate employees entitled to holiday pay and "allowed" a greater number of statutory holidays. The 1895 Act which covered only employees of the Government Printing Office, superseded the 1885 Resolution with respect to such employees. Otherwise, the 1895

[7] The term "wage rate" employees, as used in this brief, includes per diem, per hour and piecework employees.

[8] No. 22, 21, Stat. 304.

[9] No. 5, 23 Stat. 516, as amended by the Joint Resolution of February 23, 1887, No. 6, 24 Stat. 644, 5 U. S. C. § 86.

Act differed from the 1885 Resolution only by the allowance of an additional holiday (Inauguration Day) with pay.

All of the foregoing statutes "allowed" wage rate employees designated holidays and provided gratuity pay for such days. None of them specifically referred to the right of employees to additional pay whenever they were required to work on statutory holidays. Nevertheless, they were uniformly construed to entitle such employees required to work on statutory holidays to their regular compensation for actual hours of work in addition to the gratuity pay allowed by statute. The rationale of this traditional construction was clearly stated in a ruling by the Comptroller General of the Treasury to the Public Printer in 1901. In 8 Comp. Gen. Treas. 322 (1901) he stated:

> I cannot reconcile with any ideas of equity and justice the proposition that Congress ever intended by this or any other statute to allow the employees (and we are now speaking of per diem employees * * *) a legal holiday with pay, and place it in the power of * * * any * * * person to cause any such employee so working to receive just the same amount of pay for said day as those who are not compelled to work, and no more.
>
> I know of no law which forces me to such a conclusion. I know of no act which is violated by giving such employees pay for work compelled from them on such holidays. A different construction makes the act of 1895 a simulacrum as to those who are compelled to labor on such holidays, and a reality to those who are not so compelled to work.
>
> * * * The giving him pay for such a day when he does not work is the free gift of Congress, and I will not stultify such gift by taking away from him his pay on a day for which he worked because Congress saw fit to give him pay for legal holidays when he did not work.[10]

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[10] In 1906, the Comptroller General of the Treasury reiterated this construction with respect to the 1885 Resolution, 13 Comp. Gen. Treas. 40 (1906). See also 3 Dec. Comp. Gen. 411 (1924).

The reasoning of the Comptroller General's decision which refused to "stultify" the grant of Congress was confirmed in *Emmett L. Adams* v. *The United States*, 42 C. Cls. 191, 212 (1907). In that case the court pointed out that "when the statute declares certain days to be holidays and provides that certain employees shall receive the same pay as on other days, they are thereby exempt from work, with pay, on such days." Thereupon, the court concluded that if such employees were required to work on such days, they would be entitled to their regular rate of pay in addition to the gratuity pay provided by statute.

Petitioner argues that the traditional practice of paying wage rate employees for hours of work in addition to gratuity pay allowed by law whenever they are required to work on a statutory holiday is "highly questionable" (Pet. Br. 33). This argument, which was not raised in the court below, is without merit because the fundamental premise upon which it is based is erroneous. Petitioner contends that the 1901 decision of the Comptroller General of the Treasury [11] misconstrued the 1895 Act. Petitioner's argument depends upon the tenuous premise that the Comptroller General of the Treasury "may have assumed that the 1883 Act[12] was repealed by the 1895 Act, * * *" (Pet. Br. 36). Petitioner concludes that because of such assumption the 1901 decision erroneously held that the 1895 Act *required* payment of gratuity pay instead of holding that it was merely *authorized* under the Act of 1883 (Pet. Br. 33-37). The basic error in Petitioner's argument is its failure to recognize that the Act of 1883 authorized payment of *premium pay for actual hours of work* on a holiday as distinct from gratuity pay which is unrelated to hours

[11] 8 Comp. Gen. Treas. 322 (1901), *supra*, p. 12.

[12] Act of January 13, 1883, 22 Stat. 402, authorized the Public Printer to pay premium rates of pay to employees for hours worked on holidays.

of work, provided by the 1895 Act.[13] Although Petitioner does not recognize this distinction between premium pay and gratuity pay, the reasoning of the 1901 decision clearly establishes that the Comptroller General of the Treasury was aware of this distinction and that the 1883 Act was immaterial. Finally, in 1906,[14] the Comptroller General of the Treasury ruled that the *required* payment of gratuity pay under the 1885 Resolution to wage rate employees of the Navy Yard required to work on a statutory holiday did not deprive them of their right to compensation for work performed. The Act of 1883 applied only to Government Printing Office employees, and was wholly unrelated to other wage rate employees such as Navy Yard employees covered by the 1885 Resolution. Since the Comptroller General's decision concerning the 1885 Resolution with respect to Navy Yard employees is identical with his 1901 decision with respect to Government Printing Office employees, it is manifest that the Comptroller General of the Treasury actually based his 1901 decision upon the fact that the terms of the 1895 Act *required* payment of gratuity pay to wage rate employees required to work on statutory holidays. It should be noted that in both the 1901 and 1906 decisions, there was no question raised as to whether the employees were entitled to gratuity pay when they worked on holidays. The sole question was whether the allowance of such gratuity pay by law deprived employees of their right to pay for hours of work on such days.

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[13] Petitioner's confusion with respect to the distinction between premium pay and gratuity pay is apparent in its erroneous statement that "It has been stipulated (R. 9), and found by the court, below (R. 25), that from 1895 to 1938 per diem workers in the Government Printing Office received double pay for holiday work" (Pet. Br. 35). Both the stipulation (R. 9) and the court below (R. 25) demonstrate in unmistakable terms that in fact such wage rate employees required to work on a statutory holiday received *gratuity pay* in addition to compensation for actual hours of work.

[14] 13 Comp. Gen. 40 (1906) See also 3 Dec. Comp. Gen. 411 (1924).

B. The Right of Wage Rate Employees to Gratuity Pay When Required to Work on a Statutory Holiday Cannot Be Ascertained Without Resort to Holiday Statutes in Pari Materia and the Legislative History of the 1938 Resolution.

1. *The 1938 Resolution does not repeal provisions of statutes in pari materia which are not inconsistent.*

Section 2 of the 1938 Resolution repeals all other laws *only* to the extent of any inconsistency or conflict with the Joint Resolution. Petitioner's argument that the meaning of the 1938 Resolution must be ascertained without reference to the provisions of the 1895 Act is based upon the assumption that the 1938 Resolution repealed all prior holiday statutes in their entirety[15] (Pet. Br. 18, 33). The fallacy of this assumption is clearly demonstrated in *John DiBenedetto* v. *United States*, 108 C. Cls. 18, 24, 25 (1947), cert. denied, 332 U. S. 763, which expressly recognizes that the 1885 Resolution[16] was not superseded, but only modified by the 1938 Resolution. That decision establishes that the 1938 Resolution merely refers to statutory holidays, but does not in fact allow such holidays. Other holiday statutes *in pari materia*, such as the 1885 Resolution, *supra* p. 2, and the 1895 Act, *supra*, p. 2, allow the statutory holidays referred to in the 1938 Resolution.

Petitioner's interpretation of the 1938 Resolution would result in the repeal by implication of the 1885 Resolution and the 1895 Act with respect to gratuity pay for employees required to work on statutory holidays. Such an interpretation violates the fundamental rule of statutory

[15] The general repeal clause of the 1938 Resolution repealed nothing that would not have been repealed without it. Thus, any repeal must be by implication. *Hoague-Sprague Corporation* v. *Frank C. Meyer Co., Inc.*, 31 F. 2d 583, 585, 586 (E. D. N. Y. 1929).

[16] The 1895 Act of course is in precisely the same status as the 1885 Resolution with respect to the allowance of statutory holidays.

construction that "Repeals by implication are not favored". *Federal Trade Commission* v. *A. P. W. Paper Co.*, 328 U. S. 193, 202 (1946). To the extent that the 1938 Resolution is not inconsistent with holiday statutes *in pari materia*, it must be presumed that it was enacted in accord with the legislative policy embodied in those prior statutes,[17] and effect must be given to all such statutes. *Sanford* v. *Commissioner of Internal Revenue*, 308 U. S. 39, 44 (1939).[18]

Petitioner contends that since the 1938 Resolution is "clear and unambiguous" its meaning must be found only in the literal words of the Resolution (Pet. Br. 17).[19] Read literally, the 1938 Resolution clearly applies only to the situation in which employees do not work on a holiday. It makes no reference to gratuity pay when employees are required to work on a holiday. However, the 1895 Act provides gratuity pay to employees who are required to work on a holiday. Thus, if the 1938 Resolution is read literally, and "taken to mean just what it says", as Petitioner contends, it clearly has no application to the issue involved herein, and the 1895 Act governs the right of Respondents in this case.

2. *Because Petitioner's interpretation of the 1938 Resolution results in extreme and inequitable consequences, resort to its legislative history is necessary.*

Petitioner claims that the 1938 Resolution "states the only condition under which holiday pay is statutorily required" (Pet. Br. 16). The extreme consequences of Petitioner's interpretation are readily apparent in decisions of the

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[17] Cf. *Layne-Western Co.* v. *Buchanan County, Mo.*, 85 F. 2d 343, 346 (C. A. 8th, 1936).

[18] *Posadas* v. *National City Bank of New York*, 296 U. S. 497, 503 (1936).

[19] It should be noted that Petitioner in effect concedes that the language is not clear and unambiguous because in another section of its brief it seeks to resort to the "spirit" of the law to support its interpretation of the literal words (Pet. Br. 29).

Comptroller General. He has held[20] that an employee who was not required to work on a designated holiday occurring on a work day must nevertheless show facts and circumstances to prove that he would have worked but for the sole fact that it was a holiday. In other words, under Petitioner's interpretation, unless an employee is in fact ready, willing, and able to go to work on the designated holiday, he is not entitled to gratuity pay, despite the fact that he was not required to work on that day. Similarly, if a wage rate employee were required to work two hours on a statutory holiday, he would be paid only for two hours of labor under Petitioner's interpretation. Thus, he would actually receive less pay than if he were not required to work on the holiday because he was not "relieved or prevented from working" on that day. The law is settled that where the literal import of the words of a statute leads to absurd results, as shown above, resort to legislative history is necessary to ascertain the legislative intent in order to modify the words of the statute accordingly.[21]

Not only does Petitioner's interpretation lead to absurd results, but as the court below pointed out in the follow-

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[20] See decision A-97265 of the Comptroller General (August 29, 1938) in which he ruled: "If an employee of a class to which this statute applies is not actually on the job at the close of the work day preceding the holiday, whether with or without permission, it is not to be presumed as a matter of course that he was relieved or prevented from working on the holiday solely because it was a holiday; and even though he was on the job at the close of the work day preceding the holiday, it does not necessarily follow that he would have worked on the next day if it had not been a holiday if he is not on the job at the beginning of the work day following the holiday."

[21] See *Helvering* v. *Hammel*, 311 U. S. 504, 511 (1941); *United States* v. *Katz*, 271 U. S. 354, 362 (1926). "The modern cases also indicate that courts today rather than beginning their inquiries with formal words of the acts consider from the start the legislative purpose and intention." Sutherland on *Statutory Construction*, 3rd ed. (1943), Vol. 2, Sec. 4701.

ing statement, such interpretation leads to highly inequitable consequences:

> It is completely unthinkable that the owner of a printing shop could, by practice, or by contract, maintain the policy as to holiday pay which the Government here seeks to attribute to Congress. * * * in no case which we have heard of, or can imagine, could an employer maintain a practice whereby an employee who worked on a holiday received merely the same pay as one who did not work (R. 31).

The decision below is consistent with the settled rule that where a literal interpretation of a statute leads to harsh or inequitable results, the court will "resort to the policy" of the law "to ameliorate its seeming harshness or to qualify its apparent absolutes * * *." *Markham* v. *Cabell*, 326 U. S. 404, 409 (1945).

II.

The Language Of The 1938 Resolution Is Consistent With The Language of Prior Holiday Statutes With Respect To Gratuity Pay For Employees Required To Work On Statutory Holidays Occurring On Regular Work Days.

A. The Term "Relieved or Prevented" in the 1938 Resolution Is Consistent With the Term "Allowed" in Prior Holiday Statutes.

It has already been established that the holidays referred to in the 1938 Resolution are in fact allowed by holiday statutes *in pari materia*. *Supra*, p. 15. Even assuming that the right of wage rate employees to gratuity pay must be determined solely by reference to the 1938 Resolution, as Petitioner contends (Pet. Br. 16), such employees required to work on statutory holidays are nevertheless, entitled to gratuity pay.

Normally a holiday is considered a "day of exemption from labor or work", or as a "day fixed by law for the sus-

pension of business in whole or in part."[22] It is contemplated that the departments and agencies of the Government will be closed on such days.[23] Under the 1885 Resolution and the 1895 Act which "allow" the holidays referred to in the 1938 Resolution, employees are both "relieved" and "prevented" from working. This principle was established fifty years ago by the Comptroller General of the Treasury. In his 1901 decision[24] referred to above, *supra* p. 12, he stated:

> The act of 1895, *supra*, granting certain holidays to the employees of your office with pay does not confer any discretion upon you. The act is self-executing. When one of those holidays arrives, it is only a question as to whether a person is an employee of your office on that date. If he is, the law does the rest. It grants him a holiday with pay. *It is not within your power to compel him to work on such a day unless such work is a matter of public necessity, nor is it within his right to perform his ordinary duties, unless such are works of necessity on that day, and claim pay for such ordinary day's work.* * * *. [Italics supplied.]

Under the 1885 Resolution and the 1895 Act, if an employee were required by the necessities of the situation to work on a holiday, he obviously was not "allowed" the holiday. Nevertheless he received his gratuity pay in addition to his pay for hours of actual work. Because the term "relieved or prevented" merely describes the consequence of being "allowed" a holiday, it is apparent that the 1938 Resolution is consistent with the 1895 Act with respect to payment of gratuity pay when wage rate employees are required to work on a statutory holiday. Thus, under the 1938 Resolution, if an employee is not "relieved

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[22] Webster's New International Dictionary, Second Ed. Unabridged, 1948.

[23] See Ismar Baruch, Federal Holiday Pay Policies, Vol. 8 *Personnel Administration* p. 15.

[24] 8 Comp. Gen. Treas. 322 (1901).

or prevented from working", on a holiday which is allowed him, because the necessities of the situation require him to work on that day, he is similarly entitled to his gratuity pay. In the complete absence of any evidence of a contrary legislative intent it should be presumed that Congress intended to continue this traditional construction of provisions of prior holiday statutes. *United States* v. *Missouri Pac. R. Co.*, 278 U. S. 269 (1929); *United States* v. *Jackson*, 280 U. S. 183 (1930).

B. The Legislative History of the 1938 Resolution Demonstrates That Its Purpose Was to Broaden the Scope of Prior Holiday Statutes.

The 1938 Resolution was enacted to correct an injustice to wage-rate employees which grew out of an Executive Order, dated December 6, 1937, excusing federal employees from duty on December 24, 1937.[25] Since the Executive Order failed to provide pay for the holiday, wage rate employees lost their wages for the day. To remedy this situation, Mr. Ramspeck introduced a Resolution[26] in the House of Representatives, providing compensation for such employees who were excused from duty on that day. This Resolution was referred to the Committee on Civil Service. The Committee was advised by the United States Civil Service Commission that "there is the broader question involved of securing statutory authority for such payments as a general practice and thus obviate the necessity for special resolutions by Congress." H. R. Rep. No. 2683, page 2. Petitioner relies upon this statement in support of its contention that Congress intended a broad general revision of holiday pay practices in the Federal Government (Pet. Br. 28, 29). It is clear however, that the Commission's statement fails to support Petitioner's contention since it refers solely to the recurring problem of Executive

[25] Executive Order No. 7763, dated December 6, 1937; see H. R. Rep. No. 2683 (1938), 75th Cong., 3rd Sess.

[26] H. J. Res. 551 introduced on January 5, 1938.

Order holidays and merely suggested amending the Resolution so that it would cover future similar situations.

The immediate purpose of the 1938 Resolution was to eliminate the loss of wages by wage rate employees caused by uncompensated Executive Order holidays. This intent is readily apparent from the following colloquy between Mr. Ramspeck and Mrs. Rogers on the floor of the House during passage of the Joint Resolution. 83 Cong. Rec. 9466 (1938):

> *Mr. Ramspeck:* This covers the lowest-paid group of employees in the Government service. It is those who work on a per diem basis. For instance, last Christmas Eve the President excused all Government employees from rendering any service. His Executive Order, of course, applied to every employee in the Government service. Those who are working on a monthly salary got their pay for Christmas Eve, but those who work on a per diem were forced to take the day off, and they lost the day's pay. This is simply to correct that situation.
>
> *Mrs. Rogers:* This simply prevents an unintentional discrimination.
>
> *Mr. Ramspeck:* That is correct. The per diem employees are unintentionally discriminated against.

Prior to the 1938 Resolution, there was no statute which provided gratuity pay for Executive Order holidays or days when the Government departments were closed by Executive Order. In addition to providing gratuity pay for Executive Order holidays for wage rate employees, the 1938 Resolution also increased the number of employees entitled to such pay. It covered all regular wage rate employees of the Federal Government as compared with the more limited scope of prior holiday statutes.[27] Thus, it is

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[27] The 1885 Resolution was limited to employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving and other per diem employees in the United States. Temporary per diem employees and per diem employees whose duties were not

clear that the primary purpose was to broaden the scope of prior holiday statutes.[28]

C. Congress Intended to Eliminate Gratuity Pay for Holidays Occurring on Non Work Days and Used Apt Words to Accomplish This Sole Limitation of Benefits Granted by Prior Holiday Statutes.

Petitioner contends that Committee Report No. 2683 establishes that Congress intended to deprive wage rate employees of gratuity pay when required to work on a statutory holiday. To support its conclusion, Petitioner refers to certain passages appearing in the Acting Comptroller General's letter to the Secretary of the Navy, which was included in the Committee Report. Petitioner emphasizes that the letter points out in two places that wage rate employees required to work on a holiday receive "double pay" (Pet. Br. 31). It relies upon such references as evidence of a legislative intent to deprive wage rate employees required to work on a holiday of their gratuity pay. Examination of the references upon which Petitioner relies reveals that Petitioner is confused with respect to one reference (H. R. Rep. 2683, p. 4) and inaccurate with respect to the other (H. R. Rep. 2683, p. 5). The reference on page 4 of the Report refers to the right of wage rate employees "to extra pay at a higher rate for all services rendered outside of regular business hours * * *." Obviously, this reference is to premium or overtime pay as distinct from

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in a recognized trade or craft were excluded from its benefits. The 1895 Act covered only employees of the Government Printing Office. 14 Comp. Gen. 818, 820 (1935); 16 Comp. Gen. 912 (1937).

[28] H. R. Rep. No. 2683, 75th Cong. 3rd Sess. 2 (1938) contains a letter from Harry B. Mitchell, President of the Civil Service Commission, to Congressman Ramspeck, which states: "It is believed that the President had in view that the benefits of the holiday be accorded to all classes of employees to the greatest extent possible."

gratuity pay. The other reference on page 5 of the Report, upon which Petitioner relies, reads as follows:

> * * * when any of such holidays falls on a nonworkday (such as a Saturday), such employees receive pay for the holiday when no work is performed thereon, in addition to the full week's pay otherwise earned, and double compensation for the day if work is performed thereon.

It is obvious that this passage does not refer to gratuity pay for wage rate employees required to work on a statutory holiday occurring on a *regular work day*. The reference to "double compensation" relates to the payment of such compensation to wage rate employees required to work on a statutory holiday occurring on a *nonwork* day. Clearly, if gratuity pay is eliminated for statutory holidays occurring on nonwork days, the employee required to work on such days would not receive "double compensation", but would merely receive his regular rate of pay for the day. Thus, it is apparent that the Committee Report did not, as Petitioner contends, specifically deal with the subject of gratuity pay for employees required to work on statutory holidays occurring *on regular work days*.

The significance of the phrase "Whenever * * * employees * * * are relieved or prevented from working solely because of the occurrence of a holiday" must be viewed against the background of the affirmative policy of Congress to improve substantially the holiday pay status of wage-rate employees and to remedy discrimination against them as reflected in Committee Report No. 2683, *supra* p. 22. Conceding that the phrase is a limiting one, the extent of the limitation must be derived from an examination of the cause which inspired it as revealed by the available legislative material. The scope of such limitation is readily perceived in Committee Report No. 2683 which establishes that the phrase is merely intended to limit holiday gratuity pay to holidays which occur on regular work days. The

letter from the Acting Comptroller General contained in Committee Report No. 2683, pages 3-5, pointed out in the language quoted above that under existing holiday statutes wage rate employees were entitled to gratuity pay for holidays which fell on nonwork days, *supra* p. 23. The quotation from his letter continues as follows:

> During the calendar year 1936 navy yard per diem employees, as well as other per diem employees of the Government to whom the 40-hour-week statute is applicable, were paid 3 days gratuity pay under the holiday statutes, over and above their full earnings for the year, by reason of the fact that February 22, May 30, and July 4, 1936, fell on Saturday nonwork days. (See 15 Comp. Gen. 700; id. 809). It is noted in this connection that December 25, 1937, and January 1, 1938, each will fall on a Saturday.

The legislative history of the 1938 Resolution is wholly devoid of any evidence that Congress intended any limitation of gratuity pay granted by prior holiday statutes other than the elimination of gratuity pay for holidays occurring on nonwork days. Thus it is apparent that Petitioner seeks, without basis, to extend the scope of the limitation to deprive Kelly of his right to gratuity pay when required to work on a statutory holiday occurring on a regular work day. The court below rejected Petitioner's contention as follows:

> The Civil Service Commission and the House Committee in enlarging the scope of the resolution obviously had noted the Comptroller General's comment, quoted in the committee report, that the existing legislation had been so interpreted as to give employees pay for a holiday coming on a day when they would not have worked anyway. To prevent that unduly generous treatment, the language "whenever * * * employees * * * are relieved or prevented from working solely because of the occurrence of a holiday" was inserted. The words were apt for that purpose. * * * They had a purpose and were, for that purpose well chosen. We are asked only to hold that they should not be given

an additional application, which, taken literally, they could receive, when all the indications are that they were not meant to have it (R. 30-31).

Although the 1938 Resolution eliminated gratuity pay for statutory holidays occurring on a nonwork day, it is clear that wage rate employees are entitled to such pay when required to work on a holiday occurring on a regular work day. The court below pointed out that "The evil which Congress meant to cure by the words it used, it cured. The additional effect contended for by the Government would destroy a practice which no one had ever even intimated to be an evil, and which responsible officials had, for more than forty years, regarded as just and necessary" (R. 31).

D. The 1938 Resolution Is Not Concerned With Nor Does It Refer To The Payment Of Premium Pay For Work Performed On A Holiday.

Petitioner contends that the 1938 Resolution deprives wage rate employees of their gratuity pay when required to work on a statutory holiday because it remitted the "problem of additional compensation for holiday work • • • to the processes of collective bargaining and the discretion of the employing agencies" (Pet. Br. 19). Petitioner suggests that "It was quite appropriate for the 1938 Resolution to take this position with respect to premium pay" (Pet. Br. 19). Petitioner's argument is without substance because it utterly ignores the fact that premium compensation for holiday work was not paid to wage rate employees at the time the 1938 Resolution was enacted.[29] In

[29] Petitioner states that the payment of premium compensation for holiday work equal to 100% of the regular rate of pay since May 28, 1946, is evidence of the intent to remit the payment of holiday compensation to wage agreements (Pet. Br. 32). Obviously, the institution of a practice eight years after the enactment of the 1938 Resolution can have no bearing on its legislative intent. Nor can the decision of the court below awarding 50% premium pay to Respondents for work performed on holidays subsequent to 1943 have any effect on the construction of the 1938 Resolution.

1934, the Comptroller General, in 13 Comp. Gen. 295, ruled that employees of the Government Printing Office could not legally be paid premium pay for hours of work performed on holidays despite a wage agreement providing for such premium pay (R. 5, 32). Thereafter, this prohibition against payment of premium pay continued in effect until February 7, 1946, 25 Comp. Gen. 584, 589, when the Comptroller General reversed his 1934 ruling. It certainly cannot be presumed that Congress intended to remit payments of premium pay to wage agreements and the discretion of employing agencies at a time when such payments were in fact not made.

Petitioner argues that the failure of employees of the Government Printing Office to request "a revision of the pertinent terms" of their wage agreement "must be considered an acquiescence in the ruling of the Comptroller General" with respect to gratuity pay (Pet. Br. 22). In view of the fact that their existing wage agreement, *supra*, p. 3,[30] which required payment of premium pay for work performed on holidays was rendered ineffective by the Comptroller General's decision, it is obvious that a request for a revision of the wage agreement would have been a futile gesture. Therefore, it is clear that there was no acquiescence.

E. The Comptroller General's Interpretation Of The 1938 Resolution And The Annotation In The United States Code Relative To The 1938 Resolution Are Entitled To No Weight.

The Comptroller General's interpretation of the 1938 Resolution is entitled to no weight because it is predicated upon the erroneous assumption that the 1938 Resolution flatly repealed holiday statutes *in pari materia* which grant gratuity pay.[31] It has been demonstrated, *supra*, p. 15,

[30] The wage agreement in 1938 required payment of "day rate plus 50 per cent for all time actually employed" on holidays.

[31] 18 Comp. Gen. 191, 192 (1938).

that the 1938 Resolution merely modified prior holiday statutes *in pari materia* and did not repeal them. See *John Di Benedetto* v. *United States, supra,* p. 15. The law is settled that statutes *in pari materia* must be construed together, giving effect if possible to the legislative policy embodied in those prior statutes.[32] Thus, it is evident that the Comptroller General's decisions are entitled to no consideration because they made no effort to reconcile the provisions of the 1885 Resolution and the 1895 Act with the 1938 Resolution.

Petitioner claims that the interpretation of the 1938 Resolution of the House Committee on Revision of Laws, as reflected in the annotations to 5 U. S. C. 86 and 44 U. S. C. 44 in the 1940 edition of the United States Code are entitled to great weight (Pet. Br. 24). There is no merit to this contention because the Committee does not purport and has no authority to construe statutes.[33]

In *Murrell* v. *Western Union Tel. Co.*, 160 F. 2d 787, 788 (C. A. 5th, 1947), the court held as follows:

> The United States Code was not enacted as a statute, nor can it be construed as such. It is only a *prima facie* statement of the statute law. The statutes collected in it did not change their meaning nor acquire any new force by their inclusion. *If construction is necessary*, recourse must be had to the original statutes themselves. Section 2(a) of the Act of June 30, 1926, 44 Stats. Part 1, Page 1.[34] [Italics supplied.]

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[32] See Respondent's Brief, supra, pp. 15-16.

[33] The House Committee on Revision of Laws merely supervised the consolidation of the Code. "The actual work of preparing and editing the material * * * was done by the West Publishing Co. * * * and the Edward Thompson Co. * * *" Preface to 1946 Ed. Page IX, United States Code.

[34] The cases relied upon by Petitioner (Pet. Br. 24) to support its contention that the annotations are entitled to great weight do not support its contention. Those cases merely hold that where there is no inconsistency between the United States Code and the Statutes at Large, the Code shall constitute *prima facie* evidence of the law.

F. There Is No Evidence That Congress Intended the 1938 Resolution to Deprive Wage Rate Employees of Holiday Benefits in Order to Equalize the Holiday Status of Wage Rate and Per Annum Employees.

Petitioner contends that Congress intended to deprive wage rate employees of their traditional right to gratuity pay when required to work on a holiday occurring on a regular work day in order "to equalize the position of per diem and per annum workers with respect to holiday pay" (Pet. Br. 12). The court below disposed of Petitioner's contention in the following language:

> The Government suggests that the fact that per annum employees, at that time, received no extra pay when they were required to work on a holiday was a discrimination, which the Government's interpretation would eliminate. But that difference had existed for some forty-five years, no mention had been made of it in connection with this legislation; and there is no basis whatever for thinking that Congress intended to treat it. It was apparently, a recognized difference between the status of a per annum employee with his relatively secure tenure, and a per diem craftsman (R. 31).

Not only is there a complete absence of evidence in the legislative materials to support Petitioner's argument that the 1938 Resolution was enacted to equalize the holiday status of per annum employees with wage rate employees, but the expressed legislative purpose of the 1938 Resolution was to prevent "an unintentional discrimination" against "the lowest-paid group [wage rate] of employees in the Government Service." These two factors demonstrate that there is no basis in the legislative history of the 1938 Resolution to support Petitioner's argument.

Petitioner's assumption that Congress intended to equalize the holiday pay status of wage rate and per annum employees is predicated upon an erroneous conception that wage rate employees in fact enjoyed preferential treatment

as compared with per annum employees. On the contrary, at the time of the enactment of the 1938 Resolution, the Government's overall compensation policy for holidays and other nonwork days was substantially superior for per annum employees. In 1938, per annum employees were paid for every day of the year, and could be required to work on all Saturdays, Sundays and holidays[35] (Pet. Br. 25). However, most per annum employees were not required to work beyond their regular work week. On the other hand, in 1938, wage rate employees were not paid for nonwork days such as Saturdays or Sundays,[36] unless required to work on such days. Indeed, in the case of many hourly rate employees, there is no guaranteed work week and they may be laid off with only part of a day's earnings because there is insufficient work to keep them occupied for a full day. Thus, a discrimination existed, in fact, in favor of per annum employees.

Petitioner's argument also presumes that there is a single holiday pay standard which Congress sought to achieve by the simple expedient of depriving wage rate employees of gratuity pay when required to work on a statutory holiday (Pet. Br. 29). It arbitrarily assumes that all federal employees are divided into two general classifications, per annum employees and wage rate employees. Further, it assumes that all per annum employees are treated similarly with respect to holiday compensation, and that the same is true for all groups of wage rate employees. Petitioner fails to recognize that with respect to holiday pay practices as well as general employment conditions that Federal employees have traditionally been classified into numerous groups without uniform treatment. In a report by the

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[35] *Digest of Provisions of Law Fixing Pay for Employees in the Executive Branch of the Federal Government*, at p. 93.

[36] The sole exception was the occasional instance when wage rate employees received gratuity pay when a statutory holiday occurred on a nonwork day.

Hoover Commission[37] concerning federal personnel pay practices, this lack of uniformity was clearly pointed out in the following language:

> While 92 percent of all federal positions are subject to the same employment regulations, only 42 per cent are subject to any single set of pay policies. In fact, federal employees fall into five distinct groups for pay purposes, and each group is subject to widely different policies.[38]

The wide variations in holiday pay practices among various groups of federal employees are described by Ismar Baruch in *Federal Holiday Pay Policies, Personnel Administration,* Vol. 8, pp. 15, 17, as follows:

> In the Federal Service, the statutes are not uniform on this point. Some groups are granted premium pay for holiday work; some are permitted compensatory time off in lieu of extra pay; and some receive only the same pay for holiday work as they would receive if they were officially excused from working on a holiday.[39]

The lack of uniformity in holiday pay practices and other employment conditions referred to by Mr. Baruch and the Hoover Report exists among various groups of per annum employees as well as among groups of wage rate employees.

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[37] *Task Force Report on Federal Personnel* prepared for the Commission on Organization of The Executive Branch of The Government, January, 1949, pages 43, 44. See also page 57.

[38] The five groups are listed as follows: (a) Classification Act (white collar) employees; (b) Wage Board (blue collar) employees; (c) Postal Service employees; (d) Special legislative employees; custom clerk; Foreign Service; Immigration Inspectors; (e) Excepted employees (R. F. C. and T. V. A., etc., employees).

[39] The extent of the widely varying holiday pay practices applicable to Federal employees is also readily perceived from an examination of Part VIII of *The Digest of Provisions of Law Fixing Pay for Employees in the Executive Branch of the Government, supra,* at pp. 93-98.

Not only were there differences in holiday pay practices among various groups of wage rate employees[40] but there are also wide differences among different groups of per annum employees. For example, certain per annum employees of the Treasury Department required to work on a holiday in 1938 were entitled to three times their basic rate of compensation for such days of work.[41] Others, such as per annum employees of the Superintendent of Documents receive the same compensation for work on holidays as is "* * * allowed * * * [wage rate] employees of the Government Printing Office * * *."[42]

The court below pointed out that the foregoing differences in holiday pay practices as well as differences in conditions of employment among the various groups of federal employees had existed for many years. Indeed, Congress still recognizes that differences in premium and holiday pay practices exist. The Committee on Post Office and Civil Service of the United States Senate, in its report on the Federal Employees Pay Act of 1952 recommended that:

> Development of a single overtime, night, and holiday pay plan for application throughout the Federal service would be undesirable at this time. So long as fundamentally different base pay plans exist, it is logical to continue correspondingly different premium pay plans.[43]

Since the Senate Committee recognized that the development of a uniform holiday pay plan today would require consideration of numerous interrelated factors such as

[40] For example, the 1895 Act grants a statutory holiday (Inauguration Day) to employees of the Government Printing Office which has not been allowed *by statute* to any other wage rate employees up to the present.

[41] Act of February 13, 1911, c. 46, § 5, 36 Stat. 901, 19 U. S. C. 26.

[42] Act of March 4, 1925, c. 549, § 1, 43 Stat. 1300, 44 U. S. C. § 73.

[43] Committee Report No. 843, 82d Cong., 1st Sess. (1951) page 3.

base pay differences, it is illogical to assume that Congress would have sought to "equalize" the holiday pay status of all federal employees in 1938 without Committee Hearings or reference thereto in the Committee Report.

III.

The Wartime Policy Requiring Government Employees To Work On Days Normally Observed As Holidays Does Not Deprive Wage Rate Employees Of Their Right To Gratuity Pay When Required To Work On Statutory Holidays.

Petitioner claims that the court below overlooked the fact that the holidays involved herein occurred during the war period (Pet. Br. 38). It asserts that the promulgation of a wartime policy of requiring employees to work on days normally observed as holidays deprives Respondents of their right to gratuity pay (Pet. Br. 39). To support its argument, Petitioner relies upon memoranda which were sent to the heads of executive departments and agencies by W. H. McReynolds, Administrative Assistant to the President. Despite the fact that Petitioner failed to mention the memoranda in its brief or argument in the court below, it now relies for the first time upon the memoranda as a bar to Kelly's claim. However, Petitioner fails to show that the wartime policy is relevant to the issue in this case. Clearly, this policy, promulgated in 1943, has no significance in determining what Congress intended when it enacted the 1938 Resolution five years earlier, during a period of peace.

Further, as will be demonstrated hereafter, the wartime policy does not, in and of itself, bar the payment of gratuity pay to wage rate employees required to work on a statutory holiday. The memorandum of May 12, 1943, merely informed the heads of executive departments and agencies that "days normally observed * * * as holidays should with the exception of Christmas be considered as regular work

days for the duration of the war"[44] (Pet. Br. 5-6, 38). On December 17, 1943, a similar memorandum was sent to heads of executive departments and agencies over the signature of W. H. McReynolds. This memorandum contained the observation that holiday work is performed by federal employees without additional compensation (Pet. Br. 5, 6, 38). These memoranda are the bases of the wartime policy upon which Petitioner relies in support of its argument. However, the only significance of these memoranda is that they merely advised the executive heads of departments that days normally observed as holidays as a result of executive action, with the exception of Christmas, would be regular work days. Thus, for those per annum employees who normally received premium rates of pay for work on holidays, the basis of such payment was eliminated because holidays for per annum employees were not declared. The memoranda did not[45] and could not refer to wage rate employees, because holidays for such employees are allowed by statute[46] as distinct from executive action.[47]

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[44] *Digest of Provisions of Law Fixing Pay For Employees In The Executive Branch of the Federal Government, supra,* at p. 94.

[45] Petitioner's own citation to the *Digest of Provisions of Law Fixing Pay For Employees in the Executive Branch of the Federal Government,* March, 1945, at p. 94, confirms the fact that the memoranda applied only to per annum employees. A separate section of the same *Digest,* at p. 96, which lists statutory holiday provisions for wage rate employees, makes no reference to McReynolds' memoranda.

[46] See decision of the Comptroller General, 22 Comp. Gen. 1054, in which he pointed out that: "Presidential or administrative orders requiring work on legal holidays during the war emergency do not and cannot change the status of such [statutory] holidays for the purpose of applying statutes and regulations having the force and effect of law granting rights and benefits on the basis of the holidays."

[47] Petitioner relies upon the Federal Employees Pay Act of 1945 to support its wartime policy argument (Pet. Br. 38-39). However, the Committee Report accompanying the Act conclusively establishes that Congress recognized that the only holidays allowed per annum employees were those provided by executive declaration. The

Petitioner argues that Respondents were not entitled to "premium pay" during the war period because "normal peacetime holidays were * * * converted into regular work days" (Pet. Br. 38, 39). Petitioner's argument is without substance because it wholly ignores the legal basis upon which wage rate employees are entitled to holiday pay with respect to the holidays involved in this case. Respondent submits that although the days normally observed as holidays were regular work days for per annum employees, such days were in fact statutory holidays for wage rate employees. In *DiBenedetto* v. *United States*, 108 C. Cls. 18, 24, 25 (1947) cert. denied 332 U.S. 763 (1947), the court pointed out that the 1885 Resolution is "limited to per diem employees" and had no "application to the plaintiff who is paid on a per annum basis."[48] The court stated at page 25 with respect to per annum employees:

> There is no statute defining any day as a day on which they may not be required to work, or as a holiday for any purpose, in relation *to them* [per annum employees]. The days on which they have customarily been excused, before and since the war period have been determined by the executive branch of the Government. [Italics supplied.]

Although the court denied premium pay to per annum employees in the *Di Benedetto* case, it clearly indicated that if statutes allowing holidays for wage rate employees had also been applicable to per annum employees, the latter would have been entitled to premium pay. In any event, Petitioner has already conceded that Respondents

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report states at page 13 "As to any given holiday, it [Section 302 of the Act] could take effect earlier if the President has declared that such a holiday shall not be generally a work day in the Federal Service. Such a declaration already exists with respect to Christmas." H. R. Rep. No. 726, 79th Cong. 1st Sess.

[48] The Government's Brief in Opposition to the Petition for a Writ of Certiorari in the *Di Benedetto* case, emphasized that the holiday statutes involved herein were not applicable to per annum employees, as distinct from wage rate employees.

are entitled to premium rates of pay for work on statutory holidays (Pet. Br. 8, 45). Thus, it is clear that Petitioner cannot now argue consistently that the wartime policy prohibits the payment of gratuity pay to wage rate employees.

CONCLUSION.

For all of the reasons set forth in this brief, it is respectfully submitted that the decision of the court below is correct and should be affirmed.

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